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NO.'S

In The

Supreme Court of the United States

OCTOBER TERM, 1981

CHARLES D. MOELLER and LOWELL POWELL,
Petitioners

VS.

STATE OF CONNECTICUT,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Although the Petition for Writ of Certiorari is filed pursuant to the jurisdictional statement invoking 28 U.S.C. §1257(3) was the proffered federal question duly raised in the state court.

II. Assuming the invocation of the due process clause of the Fourteenth Amendment in the state court does it require the state courts to review the denial of motions to disqualify counsel on an interlocutory basis even though the individual state's appellate procedure mandates that an appeal be taken from a final judgment.

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STATEMENT OF THE CASE

The instant petition has its genesis in a holocaust which occurred on March 1, 1975, at Plant No. 4 of the Sponge Rubber Products Company located in Shelton, Connecticut. The conflagration consumed a large portion of the facilities. Several individuals were indicted and stood trial in the United States District Court for the District of Connecticut at New Haven. Petitioner Moeller was acquitted in that trial. Petitioner Powell was neither arrested nor indicted by the federal government. The background of the case and the roles of the various defendants can be found in *United States* v. *Bubar,* 567 F.2d 192 (2d Cir. 1976). Moeller was arrested on May 3, 1977, by Connecticut authorities and charged with conspiracy to commit arson in the first and second degrees. *Conn. Gen. Stats.* §§53a-48, 53a-

111; and 53a-112. Moeller was the president of the corporate owner of the property. Powell was arrested on March 10, 1977, and was accused of conspiracy to commit arson in the second degree. *Conn. Gen. Stats.*, §§53a-48 and 53a-112. This Court previously denied certiorari in Moeller's claim of double jeopardy. *State* v. *Moeller,* 444 U.S. 950 (1979). Despite the fact that the arrests occurred over five years ago neither petitioner has been tried in the state court.

On February 22, 1980, petitioner Powell filed a civil rights suit under the aegis of 42 U.S.C. §1983 against the State's Attorney who was the sole prosecutor involved in the prosecution of the petitioners. The suit alleged that the prosecutor in an investigative and administrative capacity edited and prepared an affidavit to be used in the arrest process and that its preparation and submission were under circumstances which were in reckless disregard of its truth and reliability. The federal district court stayed the civil rights action until the resolution of the criminal case. These motions to disqualify the prosecutor and his staff arose out of a hearing before the trial court on May 5, 1980, the purpose of which was to, inter alia, establish a date for trial. During that colloquy the State's Attorney did refer to the pending civil rights suit initiated by Powell. The dialogue can be found in Petitioner's Appendix D and in *State* v. *Powell,* 186 Conn. 547, 549 n.5, 442 A.2d (1982). Subsequent to this hearing each petitioner filed a motion to disqualify the prosecutor and his staff. The motions were argued and briefed and the trial court took testimony. *State* v. *Powell,* supra, n.6. The motions to disqualify were denied and the petitioners appealed to the Connecticut Supreme Court. During oral argument before that court the court sua sponte raised the jurisdictional issue of whether the appeal was from a final judgment and requested supplemental briefs. The Connecticut Supreme Court concluded that the appeals were not from final judgments but were interlocutory and dismissed the appeals. The opinion of the Connecticut Supreme Court was founded solely on its interpretation of state law as it defined the term "final judgment." Petitioners have now sought a writ of certiorari to the Supreme Court of Connecticut.

ARGUMENT

I.

The petitioners in their Statement of Jurisdiction cite 28 U.S.C. §1257(3). That statute confers jurisdiction by writ of certiorari in the following situations:

> By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

This statutory subdivision has been interpreted to mean that a federal question must have been duly raised in the state court. A reading of the opinions of the state courts clearly indicates that no federal issue was decided. In fact the only time a federal question was invoked is in the phrasing of the issue by the petitioners in their petition for writ of certiorari. The Connecticut Supreme Court decided the issue of finality by interpreting its own court rule and statute on the subject. No federal statute, treaty, or constitutional provision was a factor in the case which was decided on state grounds. Although some federal cases were cited by the court their holdings were not necessary to the court's reasoning. As in *Cardinale* v. *Louisiana,* 394 U.S. 437, 438 (1969) the sole federal question urged there had never been raised, preserved, or passed upon in the state court and it has been long established that the Court will not decide federal issues raised here for the first time on review of state court decisions. See *Monks* v. *New Jersey,* 398 U.S. 71 (1970). In *Honeymom* v. *Hanan,* 300 U.S. 14, 18-19 (1937), the Court stated that it must appear affirmatively from the record, not only that the federal question was presented for decision to the highest court of the state having jurisdiction but that its decision of the fed-

eral question was necessary to the determination of the cause. 12 *Moore's Federal Practice,* §510.01.

Absent a federal question or issue which was briefed, argued and decided before the state court it would appear that this Court is without jurisdiction to entertain the petitions for writs of certiorari. A last minute attempt to interject an issue by utilizing the petitions should not avail to remedy the deficiency.

II.

Of significance at the outset is the reiteration that *Firestone Tire & Rubber Co.* v. *Risjord,* 449 U.S. 368 (1981) was an appeal from a judgement of a court of appeals which reviewed a district court's interpretation of the federal statute which limited appeals from the lower court to "final decisions." The opinion is written on non-constitutional grounds and in reality the entire opinion centers on the Court's evaluation of the language contained in 28 U.S.C. §1291. In comparison the case sub judice was decided by the Connecticut Supreme Court on the non-constitutional basis of the interpretation of the state law encased in a rule of court and a state statute. *Conn. Practice Book* §3000 and *Conn. Gen. Stat.* §52-263; see Petitioners Appendix 4a. No federal question was presented since the determinative issue was solely one of state law. The leading federal and Supreme Court cases discussed by the court were only within the context of legal analogy and not in the sense that they were binding on the court. The Moeller and Powell cases are a matter of state law pure and simple.

In *Firestone Tire & Rubber Co.* v. *Risjord,* supra, 372 n. 8, this Court expressly stated that it did not "express any view on whether an order denying a disqualification motion in a criminal case would be appealable under §1291." Two thoughts spring from this footnote. One is that the Court is known not to give advisory opinions but stresses to respond only to the legal issue(s) before it and secondly it is clear that the Court was only guiding its opinion by its interpretation of a federal statute and its meaning as used in the federal court system.

In *Firestone Tire & Rubber Co.* v. *Risjord,* supra, this Court was giving a meaning within a specific fact situation to the term "final decisions" as expressed in 28 U.S.C. §1291. Reviewing an order in a civil case denying a motion to disqualify counsel the Court made a determination as to whether this action fell within the restricted class of cases in which appeals are permitted even though the order did not terminate the litigation but was still final and appealable under 28 U.S.C. §1291. In *Moeller* and *Powell* the Connecticut appellate court was applying the term "final judgment" as used in its rules of practice and its statute permitting review of judicial decisions. Neither case seems to be predicated on constitutional principles but rather concern the construction of federal law and state law respectively.

In *Armstrong* v. *McAlpin,* 625 F.2d 433 (2d 1980), the United States Second Circuit Court of Appeals overruled an earlier decision and declared orders denying disqualification motions would not be appealable. Although the case concerned an action for damages for violation of the securities law the court enunciated very cogent reasons not to permit the interlocutory appeal of such motions. They distinguished the appealability of motions which grant the disqualification because such orders "seriously disrupt the progress of the litigation and decisively sullies the reputation of the affected attorney." *Armstrong* v. *McAlpin,* supra, 437. There was also expressed the concern of the court that "the availability of an immediate appeal has seemingly contributed to the proliferation of disqualification motions and the use of such motions for purely tactical reasons such as delaying the trial." Such appeals freeze the litigation. It would further be urged that the denial of a motion to disqualify is not the source of irreparable harm since an appellate court is empowered to declare a new trial in appropriate situations. *Armstrong* v. *McAlpin,* supra, 437-438. The fact that a denial of the motions does not affect the ultimate final review should there be a conviction. See concurring opinion of Justice Peters, Petitioners' Appendix, 9a. To endow the defense in a criminal case with the right to seek interlocutory appeals in cases of possible prosecutorial disqualification would place in their hands

insurmountable roadblocks to the achievement of justice. With this tool they could inexorably dictate the timing of trials and ultimately whether or not a trial could be had.

Distinguished from the instant case are those cases which serve to vindicate fundamental constitutional rights. Included in this case are an order denying a defendant's claim that an impending trial will place him twice in jeopardy, *Abney* v. *United States,* 431 U.S. 651 (1979); an order denying a motion to reduce bail, *Stack* v. *Boyle,* 342 U.S. 1 (1951); and where a Congressman asserts the immunity of the Speech and Debate Clause of the Constitution. *Helstoski* v. *Meanor,* 442 U.S. 500 (1979). Precluded have been orders concerning pretrial discovery, *United States* v. *Ryan,* 402 U.S. 530 (1971); and a pretrial order denying a motion to dismiss an indictment due to an alleged violation of the right to a speedy trial. *United States* v. *MacDonald,* 435 U.S. 850 (1978) and indeed this term the Court in a per curiam opinion denied the right to take an interlocutory appeal on the claim of prosecutorial vindictiveness. Citing *Dibella* v. *United States,* 369 U.S. 121, 124 (1962), the Court opined that piecemeal appellate review was least desirable in the criminal field. *United States* v. *Hollywood Motor Car Company, Inc.,* 81-1133 (1982).

In interpreting the leading case of *Cohen* v. *Beneficial Industrial Corp.,* 337 U.S. 541 (1949) the test set forth therein has been simplified to mean that collateral orders may be appealed if (1) the order conclusively determines the disputed questions, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment. *Coopers & Lybrand* v. *Livesay,* 437 U.S. 463, 468 (1978). Even if we assume the fulfillment of the first two requirements of *Cohen* it would seem that the denial of a motion to disqualify a prosecutor is an issue which can be effectively reviewed on appeal. To date the only behavior of the prosecutor which is questioned by the defendants is his reference to a civil rights suit filed by one of them. This reference came during a discussion in court of a trial date. The court record will reflect that the early trial date sought by the prosecu-

tor was not granted by the court. Thus in this instance there was no conceivable harm to the defendants. Should trial be held clearly the trial judge and the appellate court would be impartial arbiters of his conduct. Any wrong could be rectified by one or the other.

This case is not a routine criminal prosecution. It will be necessary to call an unusual number of witnesses and proffer innumerable exhibits. The prosecutor whose actions are the subject of this motion is the only state prosecutor who has developed the case and investigated it since the fire in 1975. To disqualify him might effectively terminate the efforts of the state to prosecute the defendants. The complexity of this litigation can be appreciated by its factual recitation in *United States* v. *Bubar,* 567 F.2d 192 (2d Cir. 1976). Against this loss we must weigh the speculative claim of future harm to the defendants. It is submitted that at this time the claims of the defendants are minimal in the face of the probable damage to the criminal justice system if this interlocutory appeal were to be permitted.

CONCLUSION

The State of Connecticut respectfully represents that there is no constitutional issue raised by this case and urges this Court to deny the Petition for Certiorari.

Respectfully submitted,

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Judicial District of
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CERTIFICATION

This is to certify that three copies of the foregoing have been mailed this date, postage prepaid, to Attorney Thomas Nadeau, 55 Chapel Street, Bridgeport, Connecticut 06604 and Attorneys Alexander Harinstein and John A. Burgess, 181 Middle Street, Bridgeport, Connecticut 06604.

July 22, 1982

/s/Richard F. Jacobson
RICHARD F. JACOBSON